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In the Supreme Court of the United States

OCTOBER TERM, 1996

WINIFRED FEEZOR, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a suit brought by tribal members against a Tribe alleging that the Tribe has distributed gaming proceeds to non-members in violation of the Indian Gaming Regulatory Act is precluded by the doctrine of tribal sovereign immunity.

2. Whether the Secretary of the Interior has a mandatory duty under the Indian Gaming Regulatory Act to ensure that gaming proceeds are distributed only to tribal members.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A10) is reported at 100 F.3d 556. The first opinion of the district court (Pet. App. A26-A63) is reported at 875 F. Supp. 1353. The second opinion of the district court (Pet. App. A11-A25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1996. A petition for rehearing was denied on January 27, 1997. Pet. App. A1. The petition for a writ of certiorari was filed on April 28, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, to regulate gaming activities on Indian lands. A Tribe may engage in class II gaming (such as bingo) only if the Tribe's governing body adopts an ordinance authorizing such gaming, and the ordinance is approved by the Chairman of the National Indian Gaming Commission. 25 U.S.C. 2710(b)(1)(B). To secure approval, an ordinance must provide that net revenues from gaming will be used only to (1) fund Tribal government programs, (2) provide for the general welfare of the Tribe and its members, (3) promote tribal economic development, (4) donate to charitable organizations, or (5) help fund operations of local government agencies. 25 U.S.C. 2710(b)(2)(B). Under Section 2710(b)(3), a Tribe may use net revenues from class II gaming activities "to make per capita payments to members of the Indian tribe" if (1) the Tribe has prepared a plan to allocate revenues for the purposes specified in Section 2710(b)(2)(B); (2) the plan is approved by the Secretary of the Interior as adequate; (3) the interests of minors and other legally incompetent persons entitled to receive payments are protected, and (4) the payments are subject to federal taxation. 25 U.S.C. 2710(b)(3). Under 25 U.S.C. 2710(d), those same general requirements are applicable to class III gaming (such as casino games).

b. The Shakopee Mdewakanton Sioux (Dakota) Community (Community) operates a gaming establishment on federal trust land near Prior Lake, Minnesota. Pet. App. A4. The Community adopted a plan to distribute per capita payments in accordance with Section 2710(b)(3). *Id.* at A4, A6. The Com-

munity's plan limits per capita payments to members of the Community. *Id.* at A6. Acting on behalf of the Secretary of the Interior, the Acting Area Director of the Bureau of Indian Affairs (BIA) approved the Community's plan. *Id.* at A6, A30.

Petitioners, a group of persons who claim to be qualified members of the Community, filed suit in the United States District Court for the District of Minnesota against the Community, its Business Council, and the members of the Council (Community respondents). Pet. App. A27-A28. Petitioners also joined as defendants the Secretary of the Interior, the Acting Area Director of the BIA, and the Chairman of the National Indian Gaming Commission (federal respondents). *Ibid.* Petitioners alleged that the Community was distributing gaming proceeds to non-members and failing to distribute proceeds to persons qualified for tribal membership, in violation of Section 2710(b). *Id.* at A31. Petitioners further alleged that the federal respondents violated Section 2710(b) by failing to require the Community to distribute proceeds only to its members. *Id.* at A18.

c. The district court dismissed petitioners' claims against the Community respondents on the ground that they were barred by the doctrine of tribal sovereign immunity. Pet. App. A26-A63. The court reasoned that petitioners' claims against the Community respondents would require the court to determine who is eligible to be a member of the Community, that the Community had not waived its immunity from such a suit, and that IGRA did not purport to effect such a waiver. *Id.* at A37-A40. The district court also granted summary judgment in favor of the federal respondents. *Id.* at A11-A25. The court held that IGRA does not require the Secretary of the Interior

or the Chairman of the National Indian Gaming Commission "to intrude upon an Indian tribe's sovereign power to determine its membership for the purposes of per-capita distributions." *Id.* at A20.

2. The court of appeals affirmed. Pet. App. A2-A10. The court reasoned that "membership determinations are generally committed to the discretion of the tribes," *id.* at A7; that the Community in this case had "exercised its power to determine its membership," *ibid.*; that petitioners' complaint revealed that petitioners were attempting to challenge the Community's membership determinations, *id.* at A8; and that federal courts lack jurisdiction over such challenges, *id.* at A9.

ARGUMENT

1. Petitioners contend that federal courts have authority to entertain a suit by tribal members to preclude a Tribe from distributing gaming proceeds to non-members. That contention is without merit and does not warrant review.

a. Section 2710(b)(3) of IGRA provides that net revenues from gaming activities may be used to make per capita payments to members of the Tribe if (1) the Tribe has prepared a plan to allocate revenues for the purposes specified in Section 2710(b)(2)(B); (2) the plan is approved by the Secretary of the Interior as adequate; (3) the interests of minors and other legally incompetent persons entitled to receive payments are protected, and (4) the payments are subject to federal taxation. 25 U.S.C. 2710(b)(3). The clear implication of Section 2710(b)(3) is that a Tribe may not make per capita payments to non-members. That does not mean, however, that tribal members may sue the

Tribe in federal district court to enforce that obligation.

Indian Tribes possess the immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) (citing cases). Congress may abrogate a Tribe's immunity from suit. *Ibid.* Absent such an abrogation, however, Tribes are immune from suit. *Ibid.* A congressional abrogation cannot be implied but must be unequivocally expressed. *Id.* at 58-59.

There is no such express abrogation here. IGRA grants federal courts jurisdiction to entertain suits against Tribes in certain circumstances. See 25 U.S.C. 2710(d)(7)(A)(ii) (authorizing a suit by a State to enjoin class III gaming in violation of a Tribal-State compact); 25 U.S.C. 2710(d)(7)(A)(iii) (authorizing a suit by the Secretary to enforce gaming procedures prescribed by the Secretary). Nothing in IGRA, however, purports to subject Tribes to a suit in federal district court by individuals who claim that the Tribe is distributing gaming proceeds to non-members in violation of Section 2710(b)(3). Because Congress has not expressly authorized such a suit, the lower courts correctly concluded that petitioners' suit against the Community is barred by the doctrine of tribal sovereign immunity. [1]

Congress's failure to subject Tribes to a suit like petitioners' is understandable. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an

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[1] Quite aside from the barrier of sovereign immunity, petitioners have not established that a private right of action against the Tribe or its officials could properly be implied under IGRA. Compare *Santa Clara Pueblo*, 436 U.S. at 59-62.

independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Petitioners' suit would require a federal court to usurp that tribal function. Petitioners assert (Pet. 19) that resolution of their claims would not require the federal courts to make membership determinations. But the Community's approved plan limits the distribution of proceeds to members, and the Community has decided that all the persons who receive proceeds are members. Pet. App. A6, A40. Thus, as the court of appeals concluded, resolution of petitioners' claims would necessarily require a federal court to reexamine the Community's membership determinations. *Id.* at A8-A9.[2]

Petitioners contend (Pet. 15-16) that the absence of a private federal court remedy would mean that the Community could violate Section 2710(b) with impunity. As the court of appeals noted, however, the Community "has expressly waived sovereign immunity from suit in tribal court for actions disputing an individual's qualified status to receive per capita payments." Pet. App. A8-A9. In addition, the National Indian Gaming Commission has authority to order closure of gaming operations or to impose fines for violations of a Tribe's obligation to limit per capita payments to members of the Tribe. See 25 U.S.C. 2713. There is therefore no merit to petitioners' contention that a private action in federal court is necessary to ensure compliance with Section 2710(b).

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[2] The Secretary of the Interior has authority to review membership determinations when departmental action is required. See *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957), cert. denied, 356 U.S. 960 (1958); *Shakopee Mdewakanton Sioux Community* v. *Babbitt*, 906 F. Supp. 513, 515 (D. Minn. 1995), aff'd, 107 F.3d 667 (8th Cir. 1997); *Feezor* v. *Babbitt*, 953 F. Supp. 1 (D.D.C. 1996).

b. Petitioners err in contending (Pet. 19-20) that the decision below conflicts with *Poodry* v. *Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir.), cert. denied, 117 S. Ct. 610 (1996). In *Poodry*, members of a Tribe filed a habeas corpus action alleging that tribal council orders banishing them from the Tribe and the reservation violated various rights conferred by the Indian Civil Rights Act (ICRA). 85 F.3d at 876. ICRA expressly confers jurisdiction on federal courts to review tribal actions in habeas corpus proceedings. 25 U.S.C. 1303. The Second Circuit construed that jurisdictional provision to authorize federal court review of the Tribe's banishment orders, rejecting the Tribe's contention that the orders constituted unreviewable membership determinations. *Poodry*, 85 F.3d at 879-880.

There is no inconsistency between the Second Circuit's decision in *Poodry* and the court of appeals' decision in this case. *Poodry* involved an interpretation of ICRA, while the present case involves an interpretation of IGRA. ICRA contains a provision that expressly gives federal courts jurisdiction over suits filed by private individuals challenging tribal actions, while IGRA contains no comparable provision. The Second Circuit's decision in *Poodry* is therefore inapposite here.[3]

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[3] Because the tribal sovereign immunity issue in this case arises in the specific context of tribal membership, there is no reason to hold the petition in this case pending the Court's decision in *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, cert. granted, No. 96-1037 (June 27, 1997), which presents the question whether a Tribe is immune from suit for money damages arising from off-reservation commercial activity.

2. Petitioners' contention (Pet. 14-15) that the Secretary of the Interior violated his obligations under IGRA is similarly without merit. Under Section 2710(b)(3), the Secretary's sole obligation is to review the Tribe's "plan" for the per capita distribution of gaming revenues, and to "approve" the plan if it is "adequate." 25 U.S.C. 2710(b)(3)(B). Here, the Community's plan provided that gaming revenues would be distributed only to community members. Pet. App. A6. In approving that plan on behalf of the Secretary, the BIA Acting Area Director fulfilled the Secretary's obligation to ensure that the Community's plan was "adequate."

Petitioners apparently believe that the Secretary had an additional duty under Section 2710(b)(3)(B) to monitor the Community's distribution of gaming revenues and to ensure that the Community distributes such revenues only to members. The text of Section 2710(b)(3)(B), however, simply directs the Secretary to review a tribal plan and to approve it if it is adequate; it does not impose a mandatory monitoring function. And while the Indian Gaming Commission has authority to impose civil penalties or order closure for violations of IGRA or tribal ordinances adopted under IGRA, see 25 U.S.C. 2713, the Commission's discretionary decision concerning whether to undertake such an enforcement action is not subject to judicial review. *Heckler* v. *Chaney*, 470 U.S. 821 (1985).[4] The court of appeals therefore correctly con-

[4] Similarly, the decision whether to bring an injunctive action on behalf of the United States against the Tribe or its officials to require that per capita distributions are made in accordance with IGRA would be committed to the discretion of the Attorney General.

cluded that petitioners failed to state a claim for relief against the federal respondents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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